IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

SA.No. 865 of 1994()

AS.350/1986 of ADDL.DISTRICT COURT,KOTTAYAM
OS.146/1984 of MUNSIFF COURT, VAIKOM

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APPELLANT: APPELLANT/PLAINTIFF:

AGUSTY JOSEPH, VIRIPPUMATTATHIL
PUTHENPURAYIL, ELANJI VILLAGE,
MUVATTUPUZHA TALUK (DIED) LRS
IMPLEADED.

ADDL.2. ANNAMMA JOSEPH, W/O. AUGUSTY JOSEPH,
VIRIPPUMATTATHIL PUTHENPURAYIL,
EALANJI VILLAGE, MUVATTUPUZHA TALUK.

3. JOY P. JOSE, S/O. AUGUSTY JOSEPH, DO. DO.
4. BABY P. JOSE, S/O.JOSEPH, DO. DO.
5. TOMMY P. JOSE, S/O. JOSEPH, DO. DO.
6. MERCY PAULOSE, D/O. JOSEPH, DO. DO.
7. SHALEENA, D/O. JOSEPH, DO. DO.
8. RANI JOSE, D/O. JOSEPH, DO. DO.

ADDL. APPELLANTS 2 TO 8 ARE IMPLEADED AS
LEGAL REPRESENTATIVES OF THE DECEASED
SOLE APPELLANT AS PER ORDER DT. 22-2-2002
CMP 278/02.

BY ADV. SRI.K.SURENDRA MOHAN
SRI.ISSAC NINAN

RESPONDENTS:

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1. KERALA STATE REPRESENTED BY THE CHIEF SECRETARY, TRIVANDRUM

2. THOMMAN JOSEPH, RESIDING AT POOKKOTTIL VEETTIL, PERUMPADAVU KARA, ELANJI VILLAGE, MUVATTUPUZHA TALUK (PWD CONTRACTOR).

3. JUNIOR ENGINEER, PWD, THALAYOLAPARAMPU.

4. NJEEZHOOR PANCHAYAT, REPRESENTED BY THE PANCHAYAT EXECUTIVE OFFICER.

BY GOVERNMENT PLEADER SRI.L.G.SURESH FOR R1, R3 & R4
SRI.CHERIAN VARGHESE FOR R2
SRI.P.N.SANTHOSH
SRI.M.V.BOSE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 865 OF 1994

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Dated this the 4th day of December, 2007

JUDGMENT

Plaintiff in O.S.146/1984 on the file of Munsiff Court, Vaikom is the appellant. Defendants are the respondents. Second respondent is the contractor and first respondent the State , third respondent Junior Engineer of P.W.D and fourth respondent the Panchayat Executive Officer. Appellant instituted the suit claiming a decree for recovery of possession of the plaint schedule property and for a mandatory injunction for restoration of the compound wall allegedly destroyed by respondents and permanent prohibitory injunction from encroaching further into the property of the appellant. Case of appellant is that plaint schedule property is the portion of the property belonging to appellant under Ext.A1 purchase certificate and property having an extent of 6 acres and 10 cents in survey No.371/2 belong

to him on tenancy right and its jenm right was purchased as per order in O.A.654/1977 from Land Tribunal, Vaikom. It was contended that along the middle portion of entire property from south to north, appellant surrendered a portion of the property for Peruva-Monippally road and the road on reaching the northern end of the property of the appellant turns towards the west and proceeds further and there was a double phased kayyala on the north having a width of 5 to 8 feet and the northern kayyala was having a length of 510 feet and on 14.2.1978 while appellant was out of station V.K.Bhaskaran, contractor under third respondent without consent and knowledge of appellant forcibly dismantled the kayyala and the materials used for the kayyala were destroyed and appellant sustained a damage of Rs.9,540/-. It was contended that to avoid multiplicity of suit, he is not claiming damages for the same. It was contended that respondents have no right to encroach upon the remaining propety of appellant than the portion

surrendered for the purpose of the road and as portion of the property, which is shown as the plaint schedule property, was trespassed upon and added to the road after demolishing the compound wall, appellant is entitled to a decree for recovery possession of the same after restoring the kayyala to its original position. Second respondent contractor filed a written statement contending that he did not demolish any compound wall and he is an unnecessary party to the suit. Third respondent filed a written statement contending that the existing way was widened into a road by utilising the land surrendered by adjoining owners and the respective property owners surrendered land to enable widening of road to a width of 8 meters and in 1972 August itself stones were planted showing the surrendered portion of the property and appellant did not raise any objection with regard to the alignment and no portion of the remaining property of appellant was encroached upon and no compound wall was demolished and

therefore appellant is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws. 1 to 4, DW1 and Exts.A1 to A7, Exts.B1, B2 and Ext.C1 dismissed the suit holding that appellant failed to establish that plaint schedule property was encroached upon by respondents to form the road or that respondents demolished the double faced kayyala as claimed. The suit was dismissed. Appellant challenged the judgment before District Court,Kottayam in A.S.350/1986. Learned Additional District Judge on reappreciation of evidence found tht there is no evidence to prove that for widening the road or formation of the road, any portion of the property of appellant other than the surrendered area was trespassed upon by respondents or they demolished the kayyala and appellant is not entitled to the decree sought for. Appeal was dismissed. It is challenged in the second appeal.

3. Second appeal was admitted formulating the

following substantial questions of law.

1. Whether it is the duty of the appellant to produce negative evidence to prove encroachment of the plaint schedule property, as it does not form part of the surrendered property.

2. In a case where possession and ownership of the property is not disputed, whether appellant is to prove the title of the property again.

3. Whether courts below on the evidence were justified in holding that appellant did not establish title to the plaint schedule property.

4. Learned counsel appearing for appellant and second respondent were heard.

5. The argument of the learned counsel is that respondents have no case that there is any

puramboke land adjoining the property of appellant and their case is also that the road was formed by making use of the surrendered land by appellant and as Title of the appellant is not disputed and is proved by Ext.A1 and Ext.C1 report establish that existing kayyala on the south and west of the road was demolished for widening the road burden is on the respondents to prove that compound wall was existing in the surrendered portion of the property and on evidence it should have been found that as appellant has title to the plaint schedule property, he is entitled to the decree for recovery of possession. Learned counsel also argued that under Ext.A4 appellant requested the Panchayat for a copy of the surrender form and under Ext.A5 it was replied that records are not available with the Panchayat and in such circumstance, appellant has established that he did not surrender the plaint schedule property and as he has title, courts below should have granted the decree. Learned counsel finally argued that before

the first appellate court, appellant sought an opportunity to prove the extent of property trespassed upon over and above the surrendered land and that opportunity should have been granted and in the light of the evidence of DW1 and the contentions in the written statement that the surrendered land is only having a width of 8 meters , opportunity is to be granted to the appellant to prove that the existing road is having more width than 8 metres and the additional extent is the trespassed area and appellant is entitled to recover possession of the same on the strength of title and appeal is to be allowed.

6. Ext.A1 purchase certificate obtained by appellant pursuant to the order in O.A.654/1977 only establish that jenm right over 6 acres 10 cents in survey No.371/2 of Njeezhoor Village was assigned to the appellant. Appellant also admitted that property was surrendered for formation of the road. In the absence of any documentary evidence to prove the actual extent and description of the

property so surrendered it is not possible to fix the property surrendered by appellant for the purpose of the road. As according to appellant, he had surrendered a portion of his property and pursuant to the surrender originally existing way was formed into a road which turns towards the northern side splitting up his property into two plots, it is for him to prove that existing road is annexing more land. The case of appellant is that on the south and west of that road there existed a double faced stone compound wall constructed by appellant and that portion of the property where the compound wall was standing was not surrendered and only the property which lies further to the north and east of the stone wall was surrendered for forming the road and respondents illegally demolished the compound wall and encroahced a portion which was not acquired or surrendered, appellant is entitled to recovey possession of the same. Courts below on the evidence found that there is no material to fix what exactly is the

property which was originally surrendered by appellant. Though appellant filed an application before the Panchayat to get copy of the surrender document, Ext.A5 shows that records are not available with the Panchayat. There is no material available to find out what exactly is the description and measurement of the property which was surrendered by appellant to enable respondents to form the road.

7. As the suit is one for declaration of title and recovery of possession, burden is on the appellant to prove his title. The fact that respondents did not establish the identity of the property surrendered will not enable him to get a decree. Neither the failure of respondents to prove the identity of the property surrendered or the failure to prove the title to the disputed portion of the property will enable him to the decree. The question is whether on the evidence, it is possible to hold that plaint schedule property, which is described as the property

encroached upon by respondents to form the road, was not surrendered by the appellant. Apart from alleging that plaint schedule property was not surrendered, appellant did not specifically plead what exactly was the property surrendered. Learned counsel argued that in the light of the contentions raised in the written statement that the road was formed after the adjoining owners surrendered 8 metres width of land and if the road touching the plaint schedule property as it now stands is having a width of more than 8 metres, it could only be by encroaching upon the remaining portion of the appellant which was not surrendered. But no evidence was adduced to prove that existing width of the road, either on the north or the west, was more than 8 metres. Ext.C1 report does not give any indication to find out the width of the road through which it passes through the property of the appellant covered under Ext.A1 title deed. Therefore on the material evidence, it is not possible to hold that plaint schedule property is

part of the property belonging to appellant which was not surrendered by appellant for the formation of the road.

8. It is seen from paragraph 2 of the written statement filed by third respondent that respondents have a specific case that for the formation of the road 8 metres width of land was surrendered by the respective owners and the land so surrendered was measured and stones were fixed on either side of the road in 1972. Inspite of that pleading, appellant did not make any attempt to get the Commissioner identified the property with reference to the stones so fixed by the Government in August, 1972. When no such attempt was made to identify the property which was surrendered, first appellate court did not grant an opportunity, though an order of remand was sought. In the nature and circumstance of the case, I do not find that it is in the interest of justice to remand the suit at this belated stage, especially when appellant did not make any attempt to get the

property identified with reference to the survey stones fixed by the Government after the land was surrendered by the owners, for the formation of road. The burden to prove the identity of property cannot be shifted to the shoulders of the respondents. If the appellant failed to establish that plaint schedule property is not the property which was surrendered, he is not entitled to the decree sought for. On the evidence, courts below rightly found that appellant did not establish that plaint schedule property is a portion of the property, which was not surrendered by him for formation of the road. I find no merit in the appeal. Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006